86-119

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1986.

ROBERT P. SCHEINBLUM,
Petitioner,
v.
WILLIAM J. SULLIVAN,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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Questions Presented for Review.

1. The extent to which the constitutional protection of due process limits the power of trial courts to impose the extreme sanctions of dismissal with prejudice and default judgments without providing an opportunity for a hearing on the merits of a litigant's cause of action.

2. Whether, absent any showing or indication of bad-faith, dilatoriness, deliberate misconduct or tactical delay on the part of Petitioner, or evidence of resulting prejudice to the Respondent or loss of court time, the sudden and unexpected inability of petitioner (a party in Pro Se and an essential witness) to be present in court on the date set for trial is alone, and in and of itself, sufficient to justify the denial of his requested one week continuance (to allow him to be present), the dismissal of his civil action without a hearing on the merits, and the entry of a default judgment against Petitioner as to Respondent's counter suit.

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1. The issue presented by the facts of this case is "ripe for review" as prior relevant decisions of this Honorable Court have specifically recognized the issue, but not having the specific factual situation before it, have left the issue undecided.

2. The subject decision of the Supreme Court of the State of California on this important federal question is contrary to and in conflict with recent federal appellate court decisions based on similar facts.

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Constitution of the United States

Fifth Amendment
Fourteenth Amendment

NO.

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Opinions Below

The opinion of the Supreme Court of the State of California denying Petitioner's request for review and the opinion of the Court of Appeals, 4th Appellate District, are not reported and copies are set forth in the appendix.

Jurisdiction

The judgment of the California Supreme Court was filed on March 12, 1986. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

Statement of the Case

The one day, non-jury trial of two consolidated actions involving Petitioner, SCHEINBLUM, and Respondent, SULLIVAN, concerning the disputed title to a $50,000.00 interest in a parcel of real property located in Orange County, California,[1] was originally set for May 29, 1984, and after two continuances requested by and granted to SULLIVAN, was re-set for October 29, 1984 at 9:30 A.M.

Petitioner, SCHEINBLUM, is a retired member of the State Bars of California and Arizona, licensed to practice in the State of California and has appeared in pro se and as attorney of record from the commencement of this action.

The relevant and uncontroverted facts are that one week prior to trial, Petitioner, living and residing in the State of Utah,[2] left his home for a hunting trip in an area north of Prescott, Arizona, with the intent, plans and ability of returning and being in Orange County, California by

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1. SCHEINBLUM v SULLIVAN, Orange County Superior Court # 379631, filed June 1, 1982 (Recission, Reformation of Grant Deed and Quiet Title); SULLIVAN v SCHEINBLUM, # 384175, filed August 1, 1982 (Partition, Declaratory Relief).

2. At the time of filing the original action in June, 1982, Petitioner and his family resided in Orange County, California. In September, 1982, petitioner and his Family moved to Salt Lake City, Utah, and have lived and resided there continuously since that date.

10:45 P.M. on Sunday, October 28, prepared and ready to proceed with the trial on Monday, October 29.

Prior to leaving, Petitioner advised his wife, Sherrill Scheinblum that, as there were no telephones in the area he would be located, if she did not receive a call from him by Sunday afternoon, to assume that he was stuck in the mountains and to call both the Orange County Superior Court, (Master Calendar, Dept. 1) and Respondent's attorney first thing Monday morning and advise them that due to an unexpected and emergency situation, Petitioner was stuck in Arizona and could not be in Court and to request a one week continuance.

On Sunday morning, October 28, the truck which was Petitioner's sole means of transportation from the hunting camp to the airport in Prescott, broke down and as a result, Petitioner was not able to get back to Prescott or make contact with his wife until Tuesday, October 30.

On Monday morning October 29, at 8:00 A.M. California time, Petitioner's wife called the office of Respondent's attorney but no one answered the phone. At 8:05 A.M. she called Department 1 of the Orange County Superior Court and advised the Clerk that due to an unexpected emergency situation, Petitioner was stuck in Arizona, could not get to California in time for the trial and requested that the case be continued for one week or the first available court date. The Clerk advised her that the Court would probably not continue the case but would merely take if off calendar. At 8:30 A.M., she again called the office of Respondent's attorney and informed them of the same facts.

According to the statement of Respondent's attorney in the Trial Court, when the case was called in the Master Calendar Department (Dept. 1), ".. we were advised by the clerk in Department 1 that Mr. Scheinblum's secretary had called to indicate he was in Arizona and wouldn't be

attending the trial, was unable to attend the trial." [3]

Petitioner's telephonic request for continuance was denied, and in the absence of Petitioner or counsel to represent him (Petitioner being in pro se), or the presentation of any evidence to support Petitioner in his cause of action, the Court granted SULLIVAN'S motion to dismiss SCHEINBLUM'S lawsuit and granted judgment in SULLIVAN'S favor on his action against SCHEINBLUM, thereby awarding SULLIVAN the $50,000.00 disputed interest in the subject real property.[4]

On November 8, 1984, Petitioner filed a Motion for Reconsideration with the Trial Court, setting forth in his sworn affidavit, the facts concerning his inability to appear on the date set for trial and accompanied with copies of plane tickets verifying his declaration.[5] The Court initially declined to hear the matter, but upon having it returned to him by the Law and Motion Department, denied the motion. On appeal to the 4th Appellate District, the decision of the lower court was affirmed and Petitioner's Petition for review by the California Supreme Court was denied.

The record is clear, unequivical and uncontroverted that Petitioner has been diligent in the prosecution of his case, and discloses no evidence whatsoever of any bad faith, deliberate misconduct or tactical delay on the part of Petitioner. No prior continuances had been sought by Petitioner and the only delay of any sort has been on the part

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3. Reporter's Transcript, Page 2 Lines 12-16. If that is what occurred in Department 1, there being no transcript of the proceedings, it is contradictory to the sworn declarations of Petitioner and Sherrill Scheinblum (submitted to the Court of Appeals in Petitioner's Opening Brief) as to what facts Sherrill Scheinblum related to the clerk in Department 1.

4. Clerk's Transcript, Page 22

5. Clerk's Transcript, Pages 25-31

of Respondent.[6] Further, Respondent offered no evidence either to suggest that his case would be prejudiced by the requested one-week continuance or to refute Petitioner's claim that his inability to appear for trial occurred through circumstances reasonably beyond his control.

Reasons for Granting the Writ

The importance of this action goes far beyond the $50,000.00 interest in the real property immediately at stake. It goes to the very foundation of a litigant's constitutional right to due process[7] and the extent of this Court's recognized "constitutional limitations upon the power of courts, even in the aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case." LOGAN v ZIMMERMAN BRUSH CO. (1981) 455 U.S.

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[6]. On May 29, 1984 (the original trial date), Petitioner appeared in court, ready and prepared for trial. Without prior notice to petitioner or the Court, Respondent Sullivan appeared without his attorney and made an oral motion to continue the trial due to the alleged illness of his attorney. The motion was granted and the trial date continued for three (3) months to August 27 based on Sullivan's oral representation that that was the first available date for his attorney and notwithstanding that there were numerous earlier dates offered by the trial setting clerk (Clerk's Transcript P. 20). On August 23, Respondent was granted a second continuance for two (2) months, to October 29, on the allegation that Respondent's attorney had an out of state business meeting. (Clerk's Transcript P. 21)

[7]. A cause of action is a species of property protected by the Due Process clauses. MULLANE v CENTRAL HANOVER BANK AND TRUST CO. (1950) 339 U.S. 306. This Court "traditionally has held that the Due Process clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances". LOGAN v ZIMMERMAN BRUSH CO. (1981) 455 U.S. 422,429.

422, 429; LINK v WABASH RAILROAD CO. (1961) 370 U.S. 626; SOCIETY INTERNATIONAL v ROGERS (1957) 357 U.S. 197,209; HAMMOND PACKING CO. v ARKANSAS (1909) 212 U.S. 322; HOVEY v ELLIOTT, (1896) 167 US 409.

The facts in the present case provide a Constitutional issue that has been recognized but left undecided in the decisions of this Court dealing with the due process limitations on the power of a court to dismiss an action without a hearing on the merits, and is now "ripe for review".

In the leading case of LINK v WABASH RAILROAD CO. (supra), a sharply divided Court upheld the dismissal of an action that had been pending for six years and "was the oldest civil case on the court docket", when Petitioner's lawyer failed to appear for a pretrial conference. The majority held that it "could reasonably be inferred from his absence, as well as from the drawn out history of the litigation, that Petitioner had been deliberately proceeding in a dilatory fashion" (at Page 633). In limiting its decision to the specific facts of the case, the majority opinion stated:

> "We need not decide whether unexplained absence from a pre-trial conference would 'alone' justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of Plaintiff. For the District Court in this case relied on all the circumstances that were brought to its attention, including the earlier delays". (at Page 634)

That is the constitutional issue raised in the present case. As the record is void of any dilatoriness, intentional

misconduct or bad faith on the part of Petitioner, and is void of any indication or asertion that the short continuance would prejudice either Respondent or the court calendar, the question is, whether Petitioner's sudden and unexpected inability to be present in court is, 'alone', and in and of itself, sufficient to justify a dismissal with prejudice and deny Petitioner an opportunity both to have his cause of action heard on its merits, and offer his substantive defenses against Respondent's cause of action.

A recent lower court decision, involving similar facts, and relying on the reasoning and decision rendered in LINK (supra), found such a dismissal to violate the litigant's right to due process. In TRAKAS v QUALITY BRANDS INC., (U.S. District Court, District of Columbia, 1985) 759 F.2d 185, an out of state Plaintiff gave less than two days notice of her inability, due solely to a lack of funds, to travel to Washington for the jury trial and requested a one month continuance. In reversing the trial court's denial of the continuance and dismissal of the case, the Appellate Court held:

> "Since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success". (Pages 186-187)

> "The record discloses no evidence whatsoever of bad faith, deliberate misconduct or tactical delay."... "Plaintiff's first and only misstep was the last minute request for a continuance to allow her to be present; without her, the case could not proceed". "...we are fully

> cognizant of the need of trial courts to manage their calendars so as to dispense justice as expeditiously and efficiently as possible.".....however, 'a single act of misconduct, seldom if ever can justify dismissal'". (Page 188)

Consistent with this Honorable Court's prior decisions regarding the constitutional limitations on invoking dismissals and defaults as sanctions, it is established that such "drastic sanctions" are applicable only in extreme circumstances and when imposed, the range of the trial court's discretion is narrowed and the disobedient party's conduct must be due to wilfullness or bad faith. SIGLIANO v MENDOZA, (9th Cir. 1981), 642 F 2d 309,310; U.S. v SUMITOMO MARINE & FIRE INSURANCE CO. (9th Cir. 1980) 617 F.2d 1365,1369; THOMAS v UNITED STATES (5th Cir. 1976) 531 F.2d, 746, 749; SCHLOTHAM v RUSALEM (1953) 41 Cal. 2d 414,418; and even in those cases where a litigant has wilfully deceived the court, the decisions have maintained that "due process limits the imposition of the severe sanction of dismissal or default to the extreme circumstances in which the deception relates to matters in controversy and prevents their imposition merely for punishment of an infraction that did not threaten to interfer with the rightful decision of the case". FJELSTAD v AMERICAN HONDA MTR. CO. (9th Cir. 1985) 762 F.2d 1334,1338; IN RE RUBIN, (9th Cir. 1985) 769 F.2d 611, 618; see also PHOCEENE SOUS-MARINE, S.A. v U.S. PHOSMARINE, INC. (9th Cir. 1982) 682 F.2d 802 (Defendant left for France nine days prior to trial and on the day before trial

called from France requesting a continuance based on fraudulently alleged grounds that he had suffered a nervous breakdown; held that entry of default by the trial court violated defendant's right to due process).

In the present case, the Appellate Court appears to have based its decision on the need of trial courts to manage their calendar,[8] yet its conclusion that "it might have been ungentlemanly for opposing counsel to have refused to accede to a continuance under these circumstances" (Appendix B. P. 4) suggests not only that a continuance agreed to by Respondent would have been acceptable and not have adversly affected the Court's calendar,[9] but also that a party to an action (Respondent) has the power to determine whether or not an opposing party (Petitioner) is to be afforded the constitutional protection of due process to have his case heard on its merits. Clearly, this is the duty and responsibility of the Court, and should not be left to the whim of the adversary party.

Petitioner recognizes that efforts should be made to reduce conjestion on court dockets, but, as stated by the Honorable Justice Black (the Honorable Chief Justice concurring) in the dissenting opinion in LINK v WABASH RAILROAD CO. (supra) at Pages 648-649:

> "But that laudable objective should not be sought in a way which undercuts the very purposes for which courts were

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8. "The court has to consider more than the interests of individual litigants. It must also evaluate current and future calendars and courtroom availability." (Appendix B, Page 4)

9. It should be noted that the telephonic request for continuance was made in the Master Calendar department prior to any assignment of the case to a trial court and it is submitted that any one of a number of other cases awaiting assignment could have replaced the subject case had Petitioner's request been agreed to by Respondent or granted by the Court.

> created--that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties."
>
> "When we allow the desire to reduce court conjestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indespensible to any court system worthy of its name."

Implicit in the decision of the California court in the present case is the determination that there are no constitutional limitations on the power of a trial court to invoke the extreme sanctions of dismissal or default without a hearing on the merits, there being not one scintilla of evidence to establish or even suggest that Petitioner was guilty of intentional delay, bad faith or similar conduct demonstrating a deliberate and contumacious disregard of the Court's time or authority, or that Respondent (or the Court) would have suffered any loss or prejudice by a short, one week delay.

The series of due process decisions commencing with HOVEY v ELLIOTT, 1896 (supra) represents almost one hundred years of effort by this Honorable Court to recognize and establish that:

> "...due process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." BODIE v CONNECTICUT, (1970) 401

U.S. 371,377

To allow the decision of the lower court to stand would not only negate the due process limitations established by this Court, but would encourage trial and appellate courts to resort to and imploy too lightly, the extreme sanctions of dismissal and default.

In summary, the decision which has been reached by the California court in the facts of this case have succeeded only in working a greater injustice, not only to Petitioner, but to the judicial resources which it was presumably intended to protect. A substantial amount of judicial time has been expended, yet no justice has been done. This Court should grant the petition in order to review the judgment of the court below, and establish what constitutional limitations the Due Process clauses impose on the power of the courts to deny litigants a hearing on the merits of their causes of action.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

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ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G002295

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SCHEINBLUM

v.

SULLIVAN

Appellant's petition for review DENIED.

BAIRD

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ROBERT P. SCHEINBLUM, Plaintiff and Appellant, v. WILLIAM J. SULLIVAN, Defendant and Respondent	G002295 (Super. Ct. Nos. 37 96 31 and 38 41 75) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard J. Beacom and James K. Turner, Judges. Affirmed.

Robert P. Scheinblum, in pro. per., for Plaintiff and Appellant.

Thomas F. Kamph for Defendant and Respondent.

* * *

Robert Scheinblum's telephoned request for a trial continunace was denied, and judgment was subsequently entered for William Sullivan. We find no abuse of discretion.

The trial of two consolidated actions involving Scheinblum and Sullivan was scheduled for Monday, October 29, 1984. Two continuances had already been granted at the request of Sullivan. The week before trial, Scheinblum, an attorney representing himself, left for an out-of-state hunting trip. He told his wife to telephone the court and Sullivan's attorney if he did not call her by Sunday afternoon.

According to a later declaration, the truck which was to transport Scheinblum from his remote hunting area broke down on Sunday morning. When he did not call his wife as arranged, she telephoned the clerk in the master

calendar department on Monday morning to advise Scheinblum would be unavailable and requested a one-week continuance. His wife did not call the office of Sullivan's attorney until after he had set out for court, and he was thus in no position to explain why Scheinblum was not present and seeking the delay.

The telephonic request was denied, and the matters were assigned to a trial department. There, the court awarded judgment in Sullivan's favor on his action against Scheinbulm and granted Sullivan's motion to dismiss Scheinblum's lawsuit.

II

Generally, a continuance should be granted when based upon the unavoidable absence of an attorney or party whose presence is necessary. (MULLER V. TANNER (1969) 2 Cal. App. 3d 445, 457-458; see also Cal. Stds. Jud. Admin., § 9.) In this case, we have little idea as to what information Scheinblum's wife relayed to the court; she did not submit a declaration in support of his motion for reconsideration. Only Scheinblum did. There he admitted advising his wife before he left on vacation "as there were no telephones in the area [where] I would be hunting, if she did not receive a call from me by Sunday afternoon, to assume I was stuck in the mountains and to call both the court...and defendent's attorney...to advise them that due to an unexpected and emergency situation, I was stuck in Arizona, could not be in Court at 9:30 a.m. and to request a one week continuance."

In our view, this declaration does not establish Scheinblum's failure to appear for trial was "unavoidable." Not only was the incident foreseeable, it was foreseen. Scheinblum made a feeble contingency plan with his wife, but did not alert opposing counsel. Thus, the "emergency" preventing his appearance for trial was in good part of his own making: He deliberately elected to

place himself beyond communications and transportation knowing it might prevent his being able to return or even communicate with the court. The judge, even if he had been apprised of all the facts when the telephonic request was denied, would not have abused his discretion by that action.

Nor are we persuaded by Scheinblum's claim he should have been granted a continuance because it was his first request and opposing counsel had, months earlier, obtained two. The argument is a non sequitur. A properly -- or even improperly -- approved continuance for one side does not entitle the other to its own automatic continuance as a matter of right. The court has to consider more than the interests of individual litigants. It must also evaluate current and future calendars and courtroom availability. Each request must be considered on its own merits in light of all these circumstances. While it might have been ungentlemanly for opposing counsel to have refused to accede to a request for a continuance under these circumstances, assuming one was made, it does not also follow that it was an abuse of the court's discretion to deny the motion.

Judgment affirmed. Respondent is entitled to costs on appeal.

Crosby,J.

WE CONCUR:

Trotter, P.J.

Wallin, J.